FOR ARGUMENT (12)

NO. 96-1291

In the Supreme Court of the United States

OCTOBER TERM, 1997

DOLORES M. OUBRE
Petitioner,

versus

ENTERGY OPERATION, INC.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. The Statutory Language of the OWBPA Regulates the Enforceability of a Waiver of Rights under the ADEA Negating the Application of the Common law Doctrine of Ratification and Tender-Back

The OWBPA unambiguously states that an individual "may not waive" ADEA rights unless, at a minimum, the requirements for a knowing and voluntry waiver, found at 29 U.S.C. § 626 (f) (1) (A) - (H), are satisfied. The statutory scheme of the OWBPA was meticulously crafted by Congress.

It unequivocally mandates that a waiver which is drafted to include a forbearance of rights afforded an older worker under the ADEA is invalid if it does not meet the standard for knowing and voluntary; which can only occur if the waiver is in compliance with the requirements of the statute. The Respondent concedes that the waiver of rights at issue in the instant case is invalid under the Act and thus unenforceable against the Petitioner. (Resp. Br. 48) "That result is compelled by the OWBPA, and Congress' judgment must be honored," *Id.*

Respondent argues, however, that the petitioner has subsequently ratified the invalid waiver by failing to tender-back the monetary consideration paid for it prior to filing suit[1], or in turn is equitably estopped from filing suit because of fraudulent inducement[2]. (Resp. Br. 10-19) The

[1] The parties agree with portions of Respondent's treatise on the common law doctrine of ratification. The disagreement, however, is whether that principle applies in the instant case when the waiver of rights executed by the Petitioner plainly conflicts with the governing statutory requirements. Respondent fails to recognize that the Petitioner does not argue for the recission of a valid contract, but rather the lack of enforceability of an unlawful waiver which does not comply with the requirements of the OWBPA. See, e.g., *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, n. 12 (3rd Cir. 1997)

[2] Despite the fact that this case was dismissed below on Summary Judgment, following only limited discovery, Respondent spends a large portion of its brief (Resp. Br. 5, 9-10, 19, 48-50) on a factual issue that has never been pled, litigated, briefed or even discussed. Respondent's extraordinary claim that Ms. Oubre somehow engaged in a fraudulent scheme to bamboozle it out of the sum of $6,000.00 is based on a single question asked at a deposition to which an ambiguous answer was provided. As a disputed and highly speculative factual issue, on which the employer has the burden of proof, Respondent's allegation of fraud is disingenuous and wholly irrelevant to the question on which this Court granted certiorari.

Respondent's utilization of an equitable estoppel argument is equally

fallacy of the Respondent's argument with regard to ratification and that of its *amici* in this context is that they fail to address the straightforward language of the OWBPA. *Howlett v. Holiday Inns. Inc.* 1997 WL 450827 (6th Cir (Tenn.) Aug. 5, 1997) The statute does not authorize the defenses of ratification or tenderback. The third, sixth and seventh circuits have reached this conclusion. *Long v. Sears Roebuck & Co.*, 105 F.3d 1529 (3rd Cir 1997); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); and *Howlett v. Holiday Inns, Inc.* 1997 WL 450827 (6th Cir. (Tenn.) Aug. 5 1997). Arguably, the Eleventh Circuit is predisposed to this position as it has rejected a tender-back requirement for a pre-OWBPA waiver. *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), *cert denied*, 513 U.S. 1113 (1995)

Respondent, relying upon support from the Fourth and Fifth Circuits, attempts to rationalize a disregard for Congress' clear mandate that an individual "may not waive" an ADEA claim absent a knowing and voluntry waiver of rights by evoking the common law doctrines of ratification and tender-back. *See, Blistein v. St. John's College*, 74 F 3d 1459, 1456-66 (4th Cir. 1996); *Blakeney v. Lomas Info. Sys., Inc.*, 65 F 3d 482, 485 (5th Cir., 1995), *cert. denied*, ____ U.S. ____, 116 S. Ct. 1042 (1996) Congress, however, has asserted

footnote 2 continued

curious given the undisputed fact that the Respondent initially induced the Petitioner to waive her rights without benefit of information, time, or other protective measures required by statute and has not attempted to date to amend the waiver to conform with the requirements of the OWBPA. "The doctrine [of equitable estoppel] has been repeatedly employed to estop a party from denying or avoiding the burdens of a transaction while retaining the benefits of the transaction." (Resp. Br. 17) This doctrine applies to Respondent who has avoided the burdens of complying with Federal law while reaping the benefits of no longer having the Petitioner on the company payroll.

regulatory control over the administration of waivers under the ADEA through the enactment of the OWBPA.[3] "Congress specified certain conditions that *must* be met in order for a waiver to be knowing and voluntary." *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1653 n.3 (1991)(emphasis added); *See also, Fleming v. United States Postal Service*, 27 D.3d 259, 261 (7th Cir. 1994) ("When Federal law limits a class of releases...the common law rule requiring tender as a prerequisite to recision may have to give way.")(citations omitted) When the requirements dictated by Congress are not met, the waiver is deemed unenforceable because it was not "knowing and voluntary."

The Respondent argues that an employee who received consideration under an invalid waiver must first tender back that consideration before proceeding to Court.[4] The Respondent once again turns to common law principles,

[3] As argued by AARP, common law principles are relied upon only when Congress has failed to expressly or impliedly evince any intention on the issue. (AARP Br. 4)(citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991) Common law doctrine survives only when underlying principle is inconsistent with the Congressional intent expressed or implied in the statutes. *Id.* (citation omitted) Congress has clearly abrogated the common law principles of ratification and tender-back in enacting the OWBPA.

[4] Respondent argues that tender-back is mandated by equity to return the parties to *status quo* before the execution of the invalid waiver. In the present case, the facts are more involved than a simple return of monetary consideration. In order to return the parties to their respective positions prior to the execution of the waiver Entergy would have to once again give Ms. Oubre (and arguably all other individuals who were ranked 9 and presented similar waivers) the option of selecting to remain with the company. *See, Isaacs v. Caterpillar*, , 765 F. sup. 1359, 1367 (C.D. I11. 1991)

namely, recission in equity and at law. (Resp. Br. 12)[5] In the present case, Petitioner does not argue recission of a valid contract, but rather the unenforceability of a waiver due to its non-compliance with the OWBPA. It was Congress who dictated that non-compliance with the statute renders the waiver unenforceable.

Respondent attempts to frustrate a direct review of the issue before this Court by pontificating upon the distinction between a recision of a release and the invalidation of a waiver without first successfully arguing that the document at issue is anything but a waiver. As concisely articulated by Petitioner's *amicus curiae* "[a] waiver is not a contract....[i]t is a unilateral act with juridical significance: a knowing and voluntary renunciation of a legal right" as opposed to a release which signifies "an abandonment of a claim that might otherwise be enforced." (NELA Br. 7-9)(citations omitted)[6] The document executed by the Petitioner is a waiver of general undefined rights, not an abandonment of a known enforceable claim by the mutual consent of both parties spur-

[5] While Respondent's arguments of contractual recission are irrelevant to the issue before the Court, it appears that Respondent agrees with the premise put forth by *amicus curiae*, NELA, that under contract law the facts of the present case (as well as other anti-discrimination claims) warrant a recission in equity (which would not occur until the conclusion of the proceedings) and as such there is no need for pretrial tender. (NELA Br. 12-13) (citations omitted)

[6] Respondent's argument on the issue o f waiver versus release is hard to follow which is made evident by even the Respondent's inability to keep up with its convoluted logic. After spending several pages arguing that this case does not involve a "waiver", Respondent proceeds to define "the underlying transaction at issue" as "a waiver of legal rights" (at 27) and later in the brief, respondent again refers to the document as a waiver. (at 44)

red by risk aversion. *Cf., Fleming v. United States Postal Service,* 27 F.3d 259 (7th Cir. 1994) (Ms. Fleming entered into a settlement with her employer after suit was filed. She did not sign a waiver of undefined claims) As a waiver of ADEA rights, the requirements enumerated in the OWBPA must be present to effect a valid waiver.

Respondent urges that retention of the monetary consideration paid to Petitioner metamorphosed the invalid waiver into a valid contract subject to ratifiction.[7] Retention of monetary consideration given to the Petitioner as a condition of the waiver, however, does not make the waiver any more "knowing and voluntary" for the Petitioner as when she initially executed it. Respondent's argument is especially repugnant in light of the fact that it made no effort to comply with the Act at the time of drafting[8] nor subsequent to its execution. Accordingly, as recently stated by the Sixth Circuit '[I]t is clear from the statute that a former employee could no more assent to the waiver of his ADEA rights after having signed the defective release than he could at the time of signing it." *Howlett* 1997 WL 450827 at 3.

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[7] Tracking the argument made in *Wamsley* that the "new" promise under ratification is not subject to the waiver requirements of the OWBPA, neither the Respondent nor the Court in *Wamsley* offer justification for this exception. The "new" promise unconsciously made by the employee is still a waiver of ADEA rights, and thus is still invalid if the waiver does not comply with the OWBPA. *Howlett,* 1997 WL 450827 at 4.

[8] One can assume that Entergy Operations, Inc.-a vast utility company which operates five nuclear plants through out a tri-state area and which maintains a staff of "in-house" attorneys-was aware of the requirements of the OWBPA, eneactd in 1990, when the unlawful waiver in question was presented to the Petitioner for consideration in January 1995.

Not only does the concise language of the OWBPA negate the application of common law contractual principles, but so does the statutory structure of the statute and the legislative purpose behind its enactment. While the Respondent urges the Court to look to other aspects of the Act beyond the plain statutory language, it fails to persuade that common law doctrine should apply.[9] As conceded by the Respondent (Resp. Br. 22) "aspects of the OWBPA specify requirements not found in the common law rules" and far exceed the traditional grounds for contractual obligation avoidance such as duress, fraud, coercion or mistake. *Long v. Sears, Roebuck & Co.,* 105 F.3d 1529, 1539 (3rd Cir. 1997) Congress clearly abrogated the common law principal governing contractual obligations by codifying threshold requirements, which go beyond those found at common law, and which must be made a part of a waiver of rights under the ADEA to effect a knowing and voluntary waiver. The doctrine of ratification is "logically inconsistent with the specific terms of the OWBPA." (U.S. Br. 13, citing *Long,* 105 F 3d. at 1539 n. 17)

Further, the OWBPA alters the manner of enforcing a waiver of ADEA rights. The OWBPA places the onus of proving a knowing and voluntary waiver squarely on the employer. *Raczak v. Ameritech,* 103 F.3d 1257, 1262 (6th Cir. 1997) As pointed out by the brief submitted on behalf of the United States, Congress displaced ratification principles by imposing upon the party asserting the validity of the waiver the burden of proving the waiver is knowing and voluntary, 29 U.S.C. 626 (f) (3) This approach is contrary to the common law burden that requires the challenger proving a

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[9] "[A]ny conclusion that common law principles are not to be applied here must be drawn from other aspects of the OWBPA." (Resp. Br. 22)

waiver was not knowing and voluntary. (U.S. Br. 13)[10]

Finally, Respondent fails to address the fact that adoption of the doctrine of ratification would frustrate the purpose of the OWBPA and the ADEA.[11] The OWBPA was enacted on the heels of the EEOC abdicating its mandatory authority to supervise ADEA waivers due to lack of resources and against a backdrop that disfavored any waivers of ADEA claims. After rigorous debate, Congress authorized private execution of ADEA waivers only because of the statutory protection created by the OWBPA."The purpose of the OWBPA, to provide employees with sufficient information to evalute the worth of potential ADEA claims, would be frustrated in the very case [one in which the employer discriminates on the basis of age and intentionally withholds the information required by the OWBPA] in which the information is most important." *Howlett* 1997 WL 450827 at 4; see also *Raczak v. Ameritech Corp.*, 103 F. 3d 1257, 1262 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3001 (U.S. June 16, 1997) (No. 96-2002). Application of the ratification and tender-back doc-

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10 "This waiver approach has been fully observed by a majority of the circuits in Title VII and ADEA cases." (NELA Br. 9 n.3) (citing *Pierce v. Atchison, Topeka and Santa Fe Ry. Co.*, 65 F.3d 562 (7th Cir. 1995) (other citations omitted) (emphasis added)

11 Contrary to the Respondents disingenuous plea that adherence to the requirements of the OWBPA would discourage out of court resolutions of ADEA claims in contradiction to the purpose of the act; corporations will continue to reduce their workforce due to economic pressures or investment strategies regardless of the outcome of this matter. The incentive to obtain a valid waiver of rights as a defense to litigation does not diminish if the employer is required to obey the law by providing the older worker with time and information to make a knowing and voluntary waiver of rights - the true purpose of the law.

trines would contravene the legislative purpose of the Act and the ADEA.[12] The OWBPA affords an older worker safeguards against employer intimidation and exploitation to waive ADEA rights without sufficient time or information to consider the consequences of her actions. Further, if an employee feels compelled to waive her rights due to financial exigency and lack of information, yet later learns she was the victum of age discrimination, she is in no better position financially (and arguably worse) to tender than when she executed the waiver.

The OWBPA provides the only incentive for the employer to comply with the act by creating a desire to secure a valid waiver of right to sue. To allow an employer, especially one who participates in discriminatory activities, to violate the law by non-compliance with the provisions of the OWBPA without deterrent would render the Act meaningless and void of all protective measures the Congress attempted to secure for older workers contemplating a waiver of rights under the ADEA. If tender back is required, than an incentive is created for the employer to ignore the law and gamble that an older worker will not be in a position to tender back consideration regardless how egregious an ADEA violation the employer may have committed. *Howlett*, 1994 WL 45082 F at 4. "The efficiency of its enforcement mechanisms becomes one measure of the success of the Act." *McKennon v. Nashville*

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12 The ADEA is designed not ony to address individual grievances, but also to further important societal polices. "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Pub. Co.*, 115 S.Ct. 879, 884 (1995)

Banner Pub. Co., 115 S.Ct. 879, 885 (1995)[13] It is obvious that application of the common law doctrines of ratification and tender back would thwart the purposes of the ADEA.

II. Rejection of Tender-Back Analysis in *Hogue v. Southern Ry. Co.* is Applicable to ADEA Cases

Respondent and the EEAC argue that Petitioner's reliance on *Hogue v. Southern Railway Co.* is erroneous and not dispositive of the case at bar. 390 U.S. 516 (1968). Each attempt to make a distinction between the purpose and enforceability of the FELA, the federal statue addressed in *Hogue*, and the ADEA.[14] This distinction, however, is not dispositive of the applicability of the holding in *Hogue*. What is significant is that the Court did not rest its ruling on the actions of the parties or the statutory language noted, but turned to the general policy and objectives of the FELA to reject a pretrial tender back requirment. *Hogue*, 390 U.S. at 518. This Court's holding in *Hogue*, that a tender requirement would deter meritorious challenges to release in FELA lawsuits, equally applies with full force to claims

[13] Respondent raises the spectre that if strictly interpreted the Act would mandate that a non-conforming release could not be enforced against the employer who wishes to renege on the deal struck with the older worker. The older worker would still have remedy at law by simply suing the employer for Age Discrimination—the right to which the employer attempted to procure a waiver.

[14] Respondent argues that "[C]ongress so completely took the injured railroad worker under its protection" as to provide such liberal remedy and recovery for injured workers that a pretrial tender would be an "empty formality". (Resp. Br. 38-40) As if to caution against such oversimplifying FELA recovery, this Court has stated "[t]hat FELA is to be liberally applied, however, does not mean that it is a workers' compensation statute. We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis for his liability is his negligence, not the fact that injuries occur.' *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396, 2404 (1994) (citing *Ellis v. Union Pacific Rail Co.*, 329 U.S. 649, 653 (1947)

under the ADEA. *E.g., Forbus v. Sears, Roebuck & Co.*, 958 F. 2d 1036 (11th Cir. 1992).

By enacting the OWBPA Congress specifically took "under its protection" older workers who were confronted with a waiver of rights in exchange for departure from gainful employment and monetary consideration offered by the employer who enjoys a superior bargaining position to that of the older worker. To require a pre-suit tender back of consideration received would be wholly incongruous to the general policy of the OWBPA-to afford protection to older workers injured by unlawful age discrimination and acts as a deterrent to employers from engaging in discriminatory behavior. See, *Long*, 105 F. 3d at 1529, See also, *Robinson v. Shell Oil Co.* 117 S.Ct. 843, 848 (1997). (interpretng anti retaliation provisions of Title VII, Court looks to "primary purpose" of the statute.

III. Compliance with the OWBPA is a Defense to Protracted Litigation

Respondent and its *amici* plead that allowing an older worker to retain consideration paid pursuant to a waiver of rights and proceed with a suit for age discrimination is inherently unfair. This argument, however, is not supported by an examination of the purpose of the Act. The requirements enumerated at 29 U.S.C. § 626 (f) were specifically designed to protect employees negotiating with employers. *Long*, 105 F.3d at 1543 Each requirement provides the employee information and time to consider the proposed

waiver of rights.[15] The Act clearly places the burden on the employer to defend a waiver it drafted to entice an older worker to leave its employ. To require a tender-back would impermissibly shift that burden.

The "equity" Respondent seeks would occur in the remedial phase of a trial when a defense for set-off to damages can be raised by the employer for the monies paid under the invalid waiver.[16] *Hogue* 390 U.S. at 518.

Contrary to Respondent's assertion that the law is difficult to follow, especially given the facts of this case where the Respondent made no attempt to comply with the law, the only requirement which can be deemed ambiguous is the requirement for providing job title and classification information. 29 U.S.C. §626 (f) (1) (H)[17] Although cases of statutory

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[15] The EEAC clouds the issue of compliance by asserting that Congress intended to allow employees to forego the Act's specific requirements by signing a waiver before the expiration of the full time period required. (EEAC Br. 22) Nothing in the Act prohibits an employee from making a knowing and voluntary waiver in shorter than 21 days (or 45 days as the facts may warrant), but the Act does prohibit an employer from offering less than the maximum time allowed by the statute.

[16] The ISCC raises the issue that if a plaintiff loses on the merit of an Age Discrimination case, there will be no award from which to detract monies paid in consideration for the waiver, thus placing an employer who does not discriminate in a less favorable position than one who does. (ISCC Br. 12) The ISCC, as does the Respondent, ignores the fact that if an employer complies with the Act they have a valid defense to suit. Noncompliance with the act in the ISCC's scenario would expose the employer to loss of the consideration paid for the invalid waiver. This is a just and equitable interpretation since it is the employer who drafts the waiver and is in a far better position to protect its interests than an older worker.

[17] In fact, in the seven years since its enactment only two reported decisions have addressed this portion of the Act. *Raczak* 103 F. 3d at 1262.

interpretation regarding this provision may arise, this has little or nothing to do, as Respondent asserts, with whether tender-back should be required.[18] The statutory ambiguity is a distinct issue; it will arise regardless of whether individuals offer to tender-back their consideration, and no statutory clarity is gained by requiring a tender-back. A waiver, even one validly drafted, gives no guarantee that a suit will not be filed; it simply is a defense against a suit once filed. *Isaacs v. Caterpillar*, 702 F. Supp 711, 715 (C.D.Ill. 1988)

When provided with the information required by OWBPA, the older worker's decision to waive her rights does not necessarily become less difficult, but rather, presumably knowing and voluntary.

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[18] When faced with this issue in *Raczak v. Ameritech*, the court reached a reasonable conclusion with respect to the employer's compliance, remanding the case to the District court for a determination on the issue. 103 F.3d 1257,1264 (6th Cir. 1997)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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